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PUBLIC COMMENTS TO PROPOSED PAROLE REGULATIONS SUBMITTED BY THE RELEASE AGING PEOPLE IN PRISON (RAPP) CAMPAIGN

Submitted: October 8, 2016

To: Kathleen M. Kiley, Counsel to the Board of Parole
Department of Corrections and Community Supervision
1220 Washington Avenue, Building 2
Albany, New York 12226

RE: **I.D. No. CCS-39-16-00004-P**
Amendment of 8002.1 Title 9 NYCRR
Amendment of 8002.2 Title 9 NYCRR
Amendment of 8002.3 Title 9 NYCRR

Dear Ms. Kiley and Chairwoman Stanford:

Please accept this as public comments pursuant to the State Administrative Procedure Act, in response to the Notice of Propose Rule Making as published in the New York State Register on September 28, 2016.

Since 2011 when the New York State Legislature amended Executive Law Sec. 259-c (4) calling for the Parole Board to "establish written procedures for its use in making parole release decisions, and that such procedures incorporate 'risk and needs' principles to measure the rehabilitation of inmates, their likelihood of success if released and assist the Board in making its release decisions," there has been much fanfare as to what degree and how these principles should be incorporated. Pointedly, we have witnessed significant resistance to changing past policy and practice from those responsible for making decisions. Clearly, the 2011 amendments stirred-up a hornet's nest.

We do commend these recent efforts of Chairwoman Stanford and others to bring the parole review process into the 21st century with the application of evidence-based methodology. With the current proposed changes, the Chairwoman has apparently recognized that the law would not have been amended in 2011 to require risk and

needs assessments if the legislature was not attempting to modernize parole decision-making so that a more scientific objective approach to release decisions would take place with an emphasis on public safety, and readiness to reenter society.

So we applaud the separation of risk and needs assessments from the list of eight (8) *factors* to be considered, and to see them now included in a separate overriding category for Board consideration. And given the United States Supreme Court's decision in *Miller v. Alabama* (132 S. Ct. 2455 (2012)), we also support the proposed inclusion of "minor offender" as a special status for consideration in the decision-making process.

However, RAPP notes a few matters that predictably will be problematic if left unaddressed:

First, the repeated use of the term "*factors*" for both the overarching requirement to employ "risk and needs assessments," and then again with respect to the eight (8) enumerated items under Section 8002.2, will not only be a source of confusion, but will also provide commissioners on the Board with a documented history of resisting the use of evidence-based methodology the opportunity to operate as if this regulatory change is fundamentally insignificant in that all of these items are to be weighted equally.

We note, that the whole issue of *factors* can be further confounded by the likelihood that in the process of Board panels giving consideration to some of the eight (8) enumerated items in the proposed regulations, individuals on such panels may attempt a "second bite of the apple" with items already considered in the application of the COMPAS risk assessment instrument. A good example would be the inmate's prior criminal record, including the nature and pattern of the inmate's offenses. It would behoove the Division of Parole to take affirmative measures in any final regulatory provision to ensure that Board panels are restricted from citing ***any factor*** to override the COMPAS assessment without providing proof positive that the factor predicts future behavior by the parole applicant.

Second, the Board's proposed regulations continue the failure of the 2014 regulatory amendments in that there is no requirement for commissioners on Board panels to inform an applicant, upon denial of parole, of specific steps the applicant should take to improve his or her chances of release in the future. This, in itself, is a glaring failure to comply with Sec. 259-c (4), as the proposed regulations still do not address the "needs" component of the 2011 legislative amendment.

Third, given that amendments to the Board's regulations happen only rarely, we propose that this opportunity also be used to implement regulatory measures that could assist in the alleviation of overly harsh sentences imposed during the "get-tough-

on-crime" era, since some of such sentences present major stumbling-blocks to policymakers seeking to address the crisis of mass incarceration.

The manner in which New York's back-end release system has been operating is a contributor to mass incarceration. One indication of how problematic and entrenched the failure of some Board commissioners to conform to modern-day practice is consistently witnessed in the release rates of elderly people who have served long periods of imprisonment. During the past 14 years the overall prison population in New York State decreased by approximately 22%--from 71,466 in 2000 to 53,436 in 2014. Yet, during this same 14-year period the population of people confined in the state system age 50 and over increased by 84%--from 5, 111 in 2000 to 9,369 in 2014. It is important to note that this astronomical growth of the elderly population was not even curtailed when Executive Law 259-c (4) was amended in 2011. It is well established that this aging population has the lowest rate of recidivism—depending on age, sometimes below 1%. Even since 2011, despite this population having low recidivism rates, ample evidence of personal transformation and rehabilitation, low-risk assessment scores, along with consideration of the cost savings that could be realized, Board panels have continued to deny release to this population in a consistent and sweeping manner.

Our campaign, which has been monitoring the decisions rendered by the Board since 2013, found certain commissioners on the Board to be particularly resistant to change and openly hostile to employing evidence-based processes. We believe it is important to actually mention the names here of Board commissioners, G. Kevin Ludlow, Lisa Beth Elovich, Walter William Smith, and Marc Coppola. We believe that, given the language in which the regulations are being proposed by the Board, commissioners of their ilk will continue to seek ways to circumvent the true intent of utilizing modern processes, as opposed to adhering to their own personal politics in the course of making decisions.

The proposed regulations, as they are currently written, do not have the force of clarity to corral such members of the Board, some of whom have even demonstrated a willingness to conduct parole hearings with unreserved defiance of standing orders of contempt issued by courts of binding authority.

Without stronger and more forceful use of well-placed language in the proposed regulations, we cannot expect significant change.

A summary of RAPP's proposed adjustments is as follows:

(1) We note that although the Board has separated and made distinct risk and needs assessments and minor offender categories, the Board's proposed regulations continue to refer to them as "factors" as well as referring to the eight enumerated considerations

as factors. Given the problems this could present, we propose distinctive language and categorization for risk and needs, as well as minor offender, requirements;

(2) We included a provision in Section 800.2.4 (Post-interview requirements and consideration) where in the cases that parole is denied, the Board "...shall instruct the inmate...what actions need to be taken or accomplished for the inmate to better qualify for future release consideration"; and

(3) We have included a proposed new section which would provide the Board with regulatory authority to accelerate and recommend reduced security classification and clemency for people serving exceptionally long prison sentences.

In conclusion, ***RAPP*** is submitting *proposed adjustments* to the Board's proposed regulations (***see attached***). Our *proposed adjustments,* if adopted, will assist the process of moving the Board's practices towards the true intent of the 2011 legislative amendment to Executive Law 259-i, and these *proposed adjustments* can help ensure that the Commissioners serving on Board panels execute their duties in accord with the legal obligations provided by Executive Law Section 259-I, et seq., as well as the provisions of Title 9 NYCRR.

Respectfully submitted,

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The following quotation from NYS Assembly members provides the basis for the following changes we are submitting for consideration to the Parole Board regulations as they are currently being proposed by the New York State Board of Parole in September 2016.

> "The proposed rules treat the requirements of Sec. 259-c (4) of the Executive Law and Sec. 71-a of the Correction Law as mere additional factors for consideration by the Parole Board. Had the Legislature wished to add additional factors we would have done so. The amended statutes of 2011 do not authorize or suggest additional factors but instead require a change of procedure and a change of perspective on the part of the Board. Risk and needs assessments and TAP instruments are not new factors; instead they provide an independent, evidence-based, objective evaluation of whether or not an inmate is likely to live and remain at liberty after release without violating the law and whether or not his or her release is compatible with the welfare of society. An inmate's risk and needs assessment and case management plan should inform the Board's analysis of his or her suitability for release, not be tacked on as an afterthought to the end of the list of required factors for consideration."
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> (Daniel O'Donnell & Kenneth P. Zebrowski January 21, 2014, Letter submitted during comments period).

PROPOSED RULE MAKING
(SUGGESTED ADJUSTMENTS)

(Board proposed text crossed-out, new text underlined and italicized).

Parole Board Decision Making.
I.D. No. CSS-39-16-00004-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:
***Proposed Act*ion**: Amendment of sections 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR.
Statutory authority: Executive Law, sections 259-c(4), (11) and 259-i
***Subjec*t**: Parole Board decision-making.
Purpose: To clearly establish what the Board must consider when conducting an interview and rendering a decision.
Text of proposed rule: Section 8002.1-80023 are repealed and new sections 8002.1-8002.3 are added to read as follows:

Sec. 8002.1 Parole release interview.

(a) Each inmate shall be scheduled for a parole release interview at least one month prior to the expiration of the minimum period of imprisonment or parole eligibility date as fixed by the Department of Corrections and

Community Supervision, or upon such reconsideration date as previously set by the Board of Parole ("Board").

(b) The parole release interview shall be conducted by a panel of at least two members of the Board.

(c) The panel conducting the parole release interview shall discuss with the inmate each applicable factor set forth in section ~~8002.2~~ *8002.3* of this Part, excluding confidential information.

Sec. 8002.2 Parole release interview decision-making : ~~factors to be considered.~~ *Guidelines.*

(a) *Predominant Principle*. Risk and Needs Assessments: In making a release determination, the Board shall be guided by the inmate's risk and need scores as generated by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") assessment if prepared by the Department of Corrections and Community Supervision. If a Board determination, denying release, departs from the COMPAS scores, an individualized reason for such departure shall be given in the decision. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the Board may consider these as well.

(b) Considerations for inmates serving a maximum sentence of life imprisonment for a crime committed prior to the inmate attaining 18 years of age ("minor offender"):

1. When making any parole release decision pursuant to Section 259-i(2)(c)(A) of the Executive Law for a minor offender, the Board shall, in addition to the factors provided under ~~(a) and (b) of this section~~ *8002.3 of this section*, consider the following:
   i. The diminished culpability of youth; and
   ii. Growth and maturity since the time of the commitment offense.
2. Evidence that the hallmark features of youth were causative of, or not, in itself, demonstrate lack of insight or minimization of the minor offender's role in the commitment offense. The hallmark features of youth include

immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures.

Sec. 8002.3 Factors to be Considered: The Board shall consider the following factors in making a release determination:

(1) the institutional record, including program goals and accomplishments, a transitional accountability plan developed by the New York State Department of Corrections and Community Supervision as required under Section 71-a of the Correction Law, academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates:
(2) performance, if any, as a participant in a temporary release program;
(3) release plans, including community resources, employment, education and training and support services available to the inmate;
(4) any deportation order issued by the Federal government against the inmate while in the custody of the Department of Corrections and Community Supervision and any recommendation regarding deportation made by the Commissioner of the Department of Corrections and Community Supervision pursuant to section 147 of the Correction Law;
(5) any statement made or submitted to the Board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
(6) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the Penal Law for a felony defined in article 220 or article 221 of the Penal Law;
(7) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated, the pre-sentence probation report, as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to the inmate's current confinement; and

(8) prior criminal record, including the nature and pattern of the inmate's offenses, age at the time of commitment of any prior criminal offense, adjustment to any previous periods of probation, community supervision and institutional confinement.

Sec. 8002.4 Post-interview requirements and considerations.

(a) Granting of Release. If the Board grants the inmate release following its interview and deliberations, it shall impose the initial set of conditions that will govern his or her community supervision in accordance with the pertinent provisions of article 12-b of the Executive Law.

(b) Denial of Release. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable factors listed in *8002.3* were considered in the individual's case. *Should the board's decision denying release rely on the nature of the instant offense, or be in any other way contradictory to the conclusions of evidenced-based risk assessments, its decision shall be subject to immediate judicial review. In addition, the Board's decision shall instruct the inmate denied parole what specific and individualized actions need to be taken or accomplished for the inmate to better qualify for future release consideration*. The Board shall specify in its decision a date for reconsideration of the release decision and such date shall be not more than 24 months from the interview.

PROPOSED NEW SECTION
(TO BE ADDED TO REGULATIONS)

(***new idea and new section number***)
Reduced Security Classification and Recommended Release Decisions. 8002.8 Parole Board Accelerated Procedures for Certain Persons Over the Age of 50 Serving Indeterminate Sentences.

(a) In addition to the procedures set forth in Sections 8001.1, 800,2.2, 8002.2, and 8002.3 of Title 9, the board shall implement a process and procedure

where inmates age 50 years or over serving a sentence with a minimum period of incarceration exceeding 15 years be afforded a review of his or her case after having served 15 consecutive years of imprisonment. The purpose of the review will be to determine the inmate's suitability for reduced security classification or ***recommended*** release on parole through the ***clemency process***. Calculation of the 15-year requirement shall include all consecutively accumulated time served in either state or federal facilities.

(b) The Board shall review the cases of those inmates qualified for an accelerated 15-year security and/or clemency review using the same criteria and risk assessment process applied to discretionary review of cases regularly scheduled for parole release consideration.

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